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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID WESTLEY JENNINGS, JR.,

Defendant and Appellant.

E046762

(Super.Ct.No. SWF020706)

**OPINION**

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge.  
Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Gil Gonzalez and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant David Westley Jennings, Jr., guilty of battery on a cohabitant (Pen. Code, § 243, subd. (e)(1)), the lesser included offense of inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)) (count 1), and assault (Pen. Code, § 245, subd. (a)(1)). The trial court thereafter found true that defendant had sustained one prior strike conviction. As a result, defendant was sentenced to four years in state prison. Defendant's sole contention on appeal is that the trial court erred in admitting statements the unavailable victim made to the investigating officer. We reject this contention and affirm the judgment.

## I

### FACTUAL BACKGROUND

In April 2007, defendant and Monique C. had been dating for about two years and had two young children together. Monique lived with her mother Lynette, Lynette's brother, and Lynette's fiancé in an apartment in Hemet.

On April 7, 2007, around 10:00 a.m., Lynette, her sister Annette (Monique's aunt), their brother, Lynette's fiancé, and another niece returned home after being out for a while. Monique and defendant were in the apartment. Defendant was standing up, undressed, holding a blanket or pillow. Monique was on the floor with her knees up and her face in her hands. Annette asked Monique to look at her and tell her what had happened. Monique did not look up and did not answer the question. Annette asked defendant the same question, and defendant told her to ask Monique. Annette lifted Monique's head. Monique's eyes were swollen shut, and she had a swollen lip. She also

had red marks around her eyes and on her forehead and bruises and scratches around her neck and chest. Annette yelled at defendant, asking him if he had caused Monique's injuries. Defendant said he had and added, "That was yesterday."

A fight subsequently ensued between defendant and Monique's family members, in which they began attacking defendant. Someone called 911.

Hemet Police Department Officer Rene McNish responded to the 911 call. When the officer arrived at the scene, he heard yelling and screaming. An unidentified man was walking up a flight of stairs. Monique was standing at the bottom of the stairs. The man threw a sandal at Monique, and yelled, "Fuck you, bitch," at Monique. Monique appeared upset. Officer McNish spoke with the unidentified male, and upon determining this man was not involved in the altercation that led to the 911 call, McNish contacted Monique. Monique appeared agitated. Officer McNish asked Monique how she sustained her injuries. Monique told the officer that she had gotten into a fight with another woman. Monique also screamed, "What the fuck are you doing here? Get the fuck out of here. We don't want you here," at Officer McNish.

Officer McNish radioed for backup and looked around. He saw defendant in an apartment on the second floor of the complex, walking around and repeatedly looking outside. Officer McNish went upstairs, stood at the door to the apartment, and issued a verbal command ordering anyone inside to come out. After a second command, defendant exited the apartment and said, "Here I am. I'm here." Officer McNish asked

defendant if he had been in a fight with anyone. Defendant shrugged his shoulders but otherwise did not respond.

After Officer McNish left, Monique's family attempted to persuade her to go with them and get away from defendant. Monique refused to go. The family members left and went to Annette's house. Later that day, Monique showed up at Annette's house. In addition to the injuries the family had seen earlier, Monique had red marks on her neck. She explained that while she and defendant were at a party, defendant had beat her up. Then, after the family had left following their confrontation with defendant, defendant choked Monique and told Monique that the fight he had had with her family was her fault.

Lynette took Monique to the police station, where Monique spoke with Officer McNish and apologized for her conduct earlier at the scene. She explained that she was terrified to tell the officer what had happened because she was scared that defendant might hear her making a statement. Monique also told Officer McNish that she had a physical altercation with defendant and that during that altercation defendant repeatedly punched and slapped her. Later that same day, they had a second altercation, after defendant came home and saw Monique packing defendant's clothes. When he saw what she was doing, defendant began choking Monique by placing his hands on her neck, cutting off circulation and breathing. Monique was unsure how long defendant had his hands around her neck. Monique showed Officer McNish where defendant had choked her. Photographs showed bruising on Monique's neck in the area where defendant had

placed his hands. Officer McNish asked Monique if she desired prosecution, and Monique replied in the affirmative. Officer McNish opined Monique appeared very forthcoming with information, she did not omit any fact, and her demeanor was very different from her demeanor at the scene.

Officer McNish also had a telephonic interview with Annette. Annette told Officer McNish that her family members had beaten defendant up. Annette also stated that when asked, defendant said, “Yeah, I hit her.” Annette made the same statement in a telephone conversation with district attorney investigator Tom Gstrein. Lynette told investigator Gstrein that Monique had said she went to a party, got drunk, and did not remember what happened to her.

Monique was found to be unavailable for trial, and her preliminary hearing transcript was read to the jury. At the preliminary hearing, Monique recanted the statements she had made to Officer McNish and claimed defendant was not involved and that she did not have an argument with defendant on April 7, 2007. Monique explained that on April 6, she had gotten into a “fight with a girl” when the girl thought Monique was flirting with the girl’s boyfriend. When the fight ended, Monique and defendant went to Lynette’s house, where Monique was living at the time. When Monique’s family asked defendant how she got injured, defendant told them, “It happened last night.” The family assumed defendant had hit Monique, and they beat him up.

Monique further testified that after the family left, defendant, who had bruises from being beaten up by her family, grabbed her face, shook her, and said, “Look at what

your family did.” However, she did not have trouble breathing. Monique denied telling family members that defendant had hit her.

Monique also asserted that when she spoke with Officer McNish at the scene, she told him that she got hurt the previous night in a fight with another woman. However, a few hours after Officer McNish left, her family told her to go to the police station and get a restraining order against defendant. Monique refused to go but complied after the family members told her that if she refused, she could not live with them anymore, and she had an ill infant and nowhere else to go. She then went to the police station and reported that defendant had attacked her, punched her in the face, and choked her, resulting in her inability to breathe. She claimed she did not really remember telling Officer McNish that she and defendant had an argument at their home the previous evening. She also stated that when the officer asked her if she wanted defendant to be prosecuted, she replied in the negative.

Defense investigator Michael Izquierdo testified at trial that he had interviewed Monique five months after the incident when she came to the public defender’s office saying she wanted to “clear up” some statements she made to the police. She made the same statements to Izquierdo as at her preliminary hearing testimony. Monique told Izquierdo that on the night of April 7, members of her family confronted defendant and accused defendant of beating her up. She explained that when defendant said, “It happened last night,” the family assumed defendant had beat her up and then retaliated by battering him. Monique also told Izquierdo that defendant never hit her, but a girl at a

party hit her on April 6. Monique also told Izquierdo that she had initially told Officer McNish about her fight with the girl, and that she had further informed Officer McNish that she did not want anything to do with the case.

## II

### DISCUSSION

Defendant contends the trial court violated his Sixth Amendment right to confrontation and cross-examination when it permitted the prosecutor to impeach Monique's preliminary hearing testimony with the statements she had made to Officer McNish at the police station.

The factual background relating to this issue is as follows: After a due diligence hearing, the court found that the prosecution had made reasonable efforts to secure Monique and she was deemed unavailable. The court granted the prosecution's request to admit into evidence Monique's preliminary hearing testimony pursuant to Evidence Code section 1291.<sup>1</sup>

At a section 402 hearing, defense counsel asked that the prosecution witnesses not be allowed to impeach Monique's preliminary hearing testimony with hearsay statements not inquired about at the preliminary hearing, and not inconsistent with her testimony at the hearing. Counsel argued that section 1235 did not apply to an unavailable witness, because that witness could not be given an opportunity to admit or deny the prior

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<sup>1</sup> All further statutory references are to the Evidence Code unless otherwise indicated.

statement before it was introduced. Citing *Crawford v. Washington* (2004) 541 U.S. 36, the court found that its reading of sections 770 and 1235 was that as long as there was an opportunity to cross-examine the witness, her statements, whether consistent or inconsistent, are admissible.

We review a trial court's decision on the admissibility of evidence for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

Section 770 provides, in pertinent part: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement[.]"

Section 1235 states: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."

"'[Evidence Code section] 1235 will provide a party with desirable protection against the "turncoat" witness who changes his [or her] story on the stand and deprives the party calling him of evidence essential to his [or her] case.' [Citation.] Evidence Code section 1235 does not violate a defendant's constitutional witness-confrontation rights by permitting the admission of prior inconsistent statements as substantive evidence. [Citations.]" (*People v. Brown* (1995) 35 Cal.App.4th 1585, 1597.)

Here, Monique testified at the preliminary hearing that she had sustained her injuries in a “fight with a girl,” which took place on the evening of April 6. Monique also testified that her family members had incorrectly assumed that defendant was responsible for the injuries. As to count 2, Monique stated that defendant did not choke her but that he had simply grabbed her and complained about her family attacking him. Monique’s statements to Officer McNish at the police station that defendant had repeatedly punched and slapped her and then later choked her were clearly inconsistent with her testimony at the preliminary hearing. Accordingly, contrary to defendant’s assertions, Monique’s preliminary hearing testimony was inconsistent with what she later told Officer McNish at the police station. Her prior inconsistent statements were therefore properly admitted into evidence under sections 770 and 1235.

Defendant primarily complains that the court erred in admitting “the additional details [Officer] McNish offered.” Defendant focuses upon the portion of Monique’s preliminary hearing testimony in which she acknowledged telling Officer McNish that defendant hit her, and in which she testified that she could not recall telling the officer about an argument with defendant at their home. Defendant claims that this testimony was not “inconsistent” with Monique’s statements to Officer McNish at the police station. Defendant incorrectly focuses solely on a small portion of Monique’s preliminary hearing testimony rather than on her testimony as a whole. Monique’s testimony as a whole shows that it was generally inconsistent with her statements to

Officer McNish at the police station. We cannot find the trial court abused its discretion in admitting the challenged evidence.

We also reject defendant's claim that admission of Monique's preliminary hearing testimony violated the confrontation clause. "The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const.[,] art. I, § 15.) That right is not absolute, however. An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination.' [Citation .] [¶] . . . [¶] . . . 'Both the United States Supreme Court and this court have concluded that "when a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [citation], regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony.'" [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 332-333.) A prior opportunity for confrontation of a witness and that witness's unavailability is dispositive of the admissibility of those statements at a later trial. (*Crawford v. Washington, supra*, 541 U.S. at p. 68.) Here, defendant had the opportunity to confront Monique during her direct, cross, and redirect testimony at the preliminary hearing, and Monique was found to be unavailable at trial. In fact, defendant did cross-examine Monique at the preliminary hearing. Hence, defendant's right to confront the witnesses against him was preserved.

Even if the admission of Monique's preliminary hearing testimony was erroneous, any error was harmless. The erroneous admission of evidence in violation of a defendant's confrontation clause rights is reversible unless the error was harmless beyond a reasonable doubt. (*Lilly v. Virginia* (1999) 527 U.S. 116, 139-140; *People v. Song* (2004) 124 Cal.App.4th 973, 982.) Here, numerous witnesses testified that defendant beat Monique. Lynette testified that Monique told her that defendant beat her up. Annette testified that Monique told her that the previous evening she went out with defendant and he hit her. Monique also told Annette that after Monique's family confronted defendant, defendant choked Monique and told Monique it was her fault that he had gotten into a fight with her family. Annette further stated that defendant admitted that he hit Monique the previous day. In addition, Officer McNish and investigator Gstrein both testified that Annette told them that defendant admitted hitting Monique. The physical evidence, specifically the photographs of Monique's injuries, also supported a reasonable inference that defendant choked Monique, rather than merely grabbing and shaking her. Moreover, it appears that the jury clearly considered all of the inconsistencies in Monique's various statements in reaching its verdicts. Thus, any error was harmless beyond a reasonable doubt because no rational jury would have found defendant not guilty even without Monique's preliminary hearing testimony.

III

DISPOSITION

The judgment is affirmed.

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RICHLI  
J.

We concur:

HOLLENHORST  
Acting P.J.

McKINSTER  
J.